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No. 76-1206

In the Supreme Court of the United States

OCTOBER TERM, 1976

JAMES JUNIOR FINCH, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 548 F. 2d 822. The opinion of the district court (Pet. App. B) is reported at 395 F. Supp. 205.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1976. A petition for rehearing was denied on February 1, 1977. The petition for a writ of certiorari was filed on March 2, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause bars an appeal by the prosecution where, after reversal on appeal,

the case may be remanded for the entry of a judgment of conviction in light of the stipulated facts.

2. Whether the Crow Tribe may prohibit non-members from fishing in the portion of the Big Horn River that flows through their Reservation.

STATUTE INVOLVED

18 U.S.C. 1165 provides:

Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping or fishing thereon, or for the removal of game, peltries, or fish therefrom, shall be fined not more than \$200 or imprisoned not more than ninety days, or both, and all game, fish, and peltries in his possession shall be forfeited.

STATEMENT

Petitioner was charged in an information filed in the United States District Court for the District of Montana with knowingly fishing upon lands reserved for Indian use, in violation of 18 U.S.C. 1165.

The case was submitted to the court on an agreed statement of facts, which showed that on May 5, 1974, petitioner went fishing at a site on the bank of the Big Horn River in Montana.¹ The bank and the bed of the River at that site are within the exterior boundaries of the Crow Indian Reservation. The State of Montana

¹The stipulation appears in the record on appeal.

owns the bank at the spot upon which petitioner stood, having acquired the property by purchase. Petitioner held a fishing license issued by the Montana State Fish and Game Commission; he was aware, however, that because he is not a member of the Crow Tribe he was violating an ordinance, promulgated by the Tribe, which forbids all non-members from entering Crow lands to fish.

The district court, after considering the agreed statement of facts, dismissed the information for failure to state an offense. The court held that the Crow Tribe does not own the bed of the Big Horn River (Pet. App. 3B-7B); that, regardless of the ownership of the bed of the river, the State of Montana, as owner of the lands from which petitioner fished, holds riparian rights to fish and could authorize petitioner to exercise them (*id.* at 7B-8B); and that, in any event, the Crow Tribe does not possess the authority to prohibit strangers from fishing because the Tribe's fishing rights on the Reservation are not exclusive (*id.* at 8B-13B).

The United States appealed; the court of appeals reversed and remanded for entry of a judgment of conviction based on the stipulation. The court first held that the United States could appeal the dismissal, because there would be no need for further findings of fact before entry of judgment (Pet. App. 2A-7A). Turning to the merits of the case, the court of appeals concluded that the bed of the Big Horn River is held in trust by the United States for the benefit of the Crow Tribe (Pet. App. 7A-16A), that the tribal ordinance prohibiting non-members from fishing within the exterior boundaries of the Crow Indian Reservation is valid (*id.* at 18A-20A), and that the rights of the State of Montana, as a riparian landowner, to fish in the Big Horn River are inferior to the regulatory powers of the Crow Tribe (*id.* at 16A-18A).

ARGUMENT

1. Petitioner's contention (Pet. 4-5) that the government's appeal was barred by the Double Jeopardy Clause is incorrect. The prohibitions of the Double Jeopardy Clause are not activated unless a second trial is threatened, and "where a government appeal presents no threat of successive prosecutions, the Double Jeopardy Clause is not offended." *United States v. Martin Linen Supply Co.*, No. 76-120, decided April 4, 1977, slip op. 5.

This case was submitted to the district court on stipulated facts, and "[n]o additional facts must be found to determine whether the stipulation supports the conviction of the defendant" (Pet. App. 7A).² The court of appeals remanded for the entry of a judgment of conviction, without the need for "further proceedings of [any] sort, devoted to the resolution of *factual* issues going to the elements of the offense charged" (*United States v. Jenkins*, 420 U.S. 358, 370; emphasis added). The Double Jeopardy Clause therefore does not bar the government's appeal. See also *United States v. Morrison*, No. 75-1534, decided October 12, 1976 (Double Jeopardy Clause does not bar appeal that, if successful, will lead to reinstatement of general finding of guilt rather than to further factual proceedings relating to guilt or innocence); *United States v. Certified Grocers Co-Op*, 546 F. 2d 1308 (C.A. 7)

²Petitioner has conceded from the outset that he intentionally did what he is charged with doing, and he has argued only that his acts are not criminal. The stipulation of facts recites all of the elements of the offense (see Pet. App. 6A-7A). Although the stipulation stated that "this matter is hereby submitted to the court for its decision without further proof unless the court should desire proof on any point or points not covered herein to the satisfaction of the Court" (*id.* at 3A n. 2), the court of appeals properly concluded, in light of its discussion of the substantive law, that judgment may be entered based on the stipulation.

(Double Jeopardy Clause does not bar appeal after a finding of innocence in a bench trial, if a conviction may be entered without further factual proceedings).

2. The court of appeals exhaustively considered and properly rejected petitioner's contention that he may fish within the boundaries of the Reservation (Pet. App. 7A-20A). We rely on that opinion. As the court of appeals pointed out (*id.* at 7A-8A; footnote omitted), "[t]he United States either transferred beneficial ownership of the [River's] bed to the Crow Tribe by the treaties of 1851 and 1868 or retained ownership of the bed as public lands, which passed to the State of Montana upon the admission to the Union. [The] disposition of this case depends on which alternative the Government followed when it signed the treaties." Which alternative the United States followed depends upon a complicated analysis of treaties, the negotiations that led to them, and statutes implementing and altering them. See *Choctaw Nation v. Oklahoma*, 397 U.S. 620. This case presents no unsettled legal issue. It requires only the application, to the particular facts, treaties, and statutes involved here, of the unquestioned legal principles set out in *Choctaw Nation*. The court of appeals has performed the required analysis with scrupulous care, and no good purpose would be served by further review in this Court.³

Petitioner's further contention that the reservation of fishing rights to members of the Crow Tribe is improper or

³The State of Montana, as *amicus curiae*, contends that the court of appeals' decision portends erosion of the "equal footing" doctrine and of the principle that States ordinarily own the beds of navigable waters. It does not. The court of appeals recognized these principles (see Pet. App. 8A-10A) and held only that, pursuant to treaties, the United States had granted the bed of the Big Horn River to the Crow Tribe long before Montana was admitted into the Union.

unconstitutional (Pet. 7-9) is insubstantial. The Court has consistently rejected the argument that distinctions between tribal members and other persons constitute racial discrimination. *United States v. Antelope*, No. 75-661, decided April 19, 1977; *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463; *Morton v. Mancari*, 417 U.S. 535.

Petitioner conceded that he fished on lands within the Indian Reservation, and he has not contended that Montana possesses general jurisdiction over these reservation lands. When a State does not possess general jurisdiction, Indian tribes may control the use of land without regard to the formal rules of "title," and in so doing they may favor members of the Tribe over non-members.⁴ Cf. *United States v. Muzurie*, 419 U.S. 544. Given the importance of fishing rights to Indian tribes (*Menominee Tribe of Indians v. United States*, 391 U.S. 404, 405-406), the Crow Tribe can hardly be thought to have surrendered in the treaties of 1851 and 1868 the right to exclude future white settlers from fishing within the Reservation.

⁴Similarly, federal law may prohibit fishing within the boundaries of a national park, even though this displaces more permissive state laws pertaining to navigable waters, owned by a State, within the park. *United States v. Brown*, C.A. 8, decided April 1, 1977. Cf. *Kleppe v. New Mexico*, 426 U.S. 529.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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